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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 315

THE AUSTIN COMPANY,
Petitioner,

vs.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To United States Court of Claims.

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To United States Court of Claims.

Petitioner, The Austin Company, prays that this Court issue its writ of certiorari to the United States Court of Claims to bring to this Court for review the record in cause No. 177-61 on the docket of that court wherein the Court of Claims, entering summary judgment against this petitioner, dismissed the complaint, whereas the court, as a matter of law, should have entered judgment for petitioner. In so ruling, the Court of Claims has given to the standard default clause utilized in Government contracts a construction that, if permitted to become law, for years to come will operate to victimize those who contract with the Government.

OPINIONS BELOW.

The opinion of the Court of Claims is reported in 314 F. 2d 518 and in 9 CCF ¶ 72,019, and appears also in the Appendix hereto, separately printed, at page 21; the opinion of the United States Armed Services of Board of Con-

tract Appeals (from which the case went to the Court of Claims) is reported in 61-1 BCA ¶ 2,927, and is printed in the Appendix hereto at page 1.

JURISDICTION.

The judgment of the Court of Claims, dated March 6, 1963, was entered on the same day; petition for rehearing, timely filed, was denied by the Court of Claims by order dated, and entered on, May 10, 1963.

This Court has jurisdiction to review pursuant to 28 U. S. C. § 1255.

QUESTIONS PRESENTED.

This case tenders to this Court for review the questions:

1. Whether the standard default clause utilized in Government contracts (excusing nonperformance for causes beyond the control and without the fault or negligence of the Contractor) which says:

   "such causes include, *but are not restricted to* [the causes specifically enumerated]"

   may, as the Court of Claims amazingly held, be deemed *restricted to* the causes specifically enumerated.

2. Whether the Court of Claims has loosed on the law an indefensible re-shaping of the rule of *ejusdem generis*.

3. Whether the Court of Claims is bound by the findings of the administrative board from which a case comes to it, until and unless the court is willing to set such findings aside as clearly erroneous, or whether the court may merely ignore findings inconsistent with its decision.

STATEMENT OF CASE.

The questions this case presents emerge from the following facts:

—The Contract in Question.

The Austin Company, petitioner, entered into a contract to design and manufacture for the United States a data recorder and transcriber. The function the machine was to serve was to gather data from multiple remote points aboard a vessel (a submarine, for example) and encode the data in digital form on magnetic tape for processing by Univac. The simultaneous and instantaneous assembly of data revealing stresses and strains under operating conditions in stationary and moving parts (hull and propeller shaft, for example) would aid in the design of submarines and other craft. (Finding 3; Appendix, pp. 1-3.)

Such a device had never before existed. Its design involved exploration on the frontiers of knowledge. (Finding 9; Appendix, p. 8.)

—Terminated by Government.

The Government's contracting officer decided that the requirements of the contract "were possible of attainment" (Finding 13, Appendix, p. 12) but, "deeming progress as too slow" (Finding 13, Appendix, p. 9) terminated the contract.

The Austin Company had performed "diligently" and had "incurred expenditures of $290,000" (Appendix, p. 22) on a contract on which it never could collect more than $177,500. Upon the cancellation of the contract, the Austin Company was required to, and did, repay to the Government, with interest, the $126,468.75 it had theretofore

received in progress payments. (Finding 13, Appendix, p. 12.)

If the cancellation, in the words of the contract, must be deemed a termination "for the convenience of the Government," then the Austin Company is entitled to recover in the manner and to the extent in such case provided in the contract, but not to exceed $177,500. On the other hand, if the standard default clause may be given the meaning that, in defiance of its terms, the Court of Claims attributed thereto, then the decision below is correct and that is the end of this lawsuit. It also will be the end of many a Government contractor.

—Default Clause of Contract.

The contract, utilizing the standard Government default clause, says:

> "If * * * it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor pursuant to the provisions of paragraph (b) of this clause, such Notice of Default shall be deemed to have been issued pursuant to the clause of this contract entitled 'Termination for Convenience of the Government,' * * *." (Contract in suit, Exhibit A, ¶ 11 (e).)

The paragraph (b) referred to, excuses the contractor:

> "if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes * * *." (Contract in suit, Exhibit A, ¶ 11 (b).)

—Findings of Appeals Board.

The United States Armed Services Board of Contract Appeals, to which the contracting officer's decision was appealed, found performance of the contract was "impossible." (Finding 1, Appendix, p. 1; Finding 14, Appendix, p. 13.)

The device called for by the contract "had never been constructed," the Board found. "Nor was such a system known at the time when the contract was executed (nor is it known today)." (Finding 9, Appendix, p. 8.) The "precision required" could not be achieved "in the existing state of the art." (Finding 14, Appendix, p. 13.) "Successful performance required that Appellant produce beyond the state of the art in this field." (Finding 9, Appendix, p. 8.)

The Board further found that the Austin Company at all times acted "in good faith." (Finding 14, Appendix, p. 13.) The company "employed practices generally accepted and recognized by careful, prudent and competent engineers" (Finding 14, Appendix, p. 13) and "diligently endeavored to perform" the contract in all respects. (Finding 1, Appendix, p. 1; Finding 14, Appendix, p. 13.)

Notwithstanding these findings, the Board denied relief. It, by mistake of law, supposed the Austin Company "assumed the risk of unsuccessful performance" (Finding 19, Appendix, p. 19) even though, as has been noted, the contract provides to the contrary.

—Decision of Court of Claims.

The Court of Claims, taking jurisdiction under 41 U. S. C. § 113 (a), granted the Government's motion for summary judgment and dismissed the suit.

To reach this result the Court of Claims fashioned a new rule of *ejusdem generis*, denuding of all meaning the provision of the contract excusing performance for "causes beyond the control and without the fault or negligence of the Contractor." The Court of Claims, forgetting that it had on page 3 of the opinion (Appendix, p. 23), noted that the contract says the excusable causes "include, but *are not restricted to*" the causes enumerated, on the next page of the opinion reached the astonishing conclusion that the rule of *ejusdem generis* (Appendix, pp. 24-25):

> "operates *to restrict* the clause to exculpation of non-performance due to the kind or class of extraneous contingencies enumerated therein, *i.e.*: acts of God, etc."

This reshaping of the rule of *ejusdem generis*, which alone enabled the Court of Claims to reach the result it reached, is without the support of any decided case by any court anywhere. It mangles the meaning of the standard default clause in Government contracts. The court explained its decision with this bit of judicial wisdom (Appendix, p. 25):

> "Plaintiff was not under any compulsion to enter into the contract."

This is true, but it is no excuse for making mishmash out of plain terms in a contract.

ARGUMENT.

This Court should issue its writ of certiorari to review this case because—

I. DECISION BELOW GIVES TO STANDARD DEFAULT CLAUSE USED IN GOVERNMENT CONTRACTS CONSTRUCTION THAT, CONTRARY TO ITS TERMS, WILL IMPOSE UNJUSTIFIED LOSSES ON THOSE WHO CONTRACT WITH GOVERNMENT.

The decision here launched on the sea of the law by the Court of Claims is of obvious importance, for, as the United States Armed Services Board of Contract Appeals noted, the case deals with the construction to be given to "the standard default article" used in Government contracts. (Appendix, p. 15.)

The result of the decision is to construe this clause to mean that the Government contractor—in this case the Austin Company—assumes "the risks of impossibility of performance." (Appendix, p. 25.) This would be an astonishing rule in any case; it is especially so in a case where, as here, the contract called for the design and construction of a device that, as the Board found (Finding 9, Appendix, p. 8):

> "had never been constructed. Nor was such a system known at the time when the contract was executed (nor is it known today). Successful performance required that Appellant produce beyond the state of the art in this field."

But, where, as here, the parties have contracted for the contrary result, the decision can be regarded only as a trap for anyone contracting with the Government. In light of the "perilous scientific development" and "hazardous manufacturing procedures" that, as the Board recognized

(Finding 19, Appendix, pp. 18-19) faced the Contractor, it was agreed that (Finding 15, Appendix, p. 14):

> "If * * * failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor * * * Notice of Default *shall be deemed* to have been issued pursuant to the clause of this contract entitled 'Termination for Convenience of the Government,' * * *."

This Court should require the Government, when it contracts with citizens, to turn square corners.

II. COURT BELOW REACHED DECISION BY FASHIONING NEW RULE OF EJUSDEM GENERIS.

The Court of Claims reached its astounding conclusion by forging a new rule of *ejusdem generis* that, if permitted to stand, will plague courts, the law, and lawyers for years to come.

Because the Austin Company suggested, and the Government accepted, revisions in the Government's original specifications to cure deficiencies in the original that all hands agree made the original specifications inoperable, the Court of Claims leaped to the unjustifiable conclusion that the Austin Company thereby guaranteed performance even though, as has been noted, the contract is to the contrary. The Court of Claims said (Appendix, pp. 24-25):

> "We agree with the defendant [*i.e.*, the Government] that the rule of *ejusdem generis* is applicable to interpretation of the nonperformance clause in this contract, and operates *to restrict* the clause to exculpation of nonperformance due to the kind or class of extraneous contingencies enumerated therein, *i.e.*: acts of God, etc."

Note particularly that this was said about the standard default article in the contract which excuses the contractor (Appendix, p. 23):

> "if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, *but are not restricted to*, acts of God [and other enumerated causes] * * *."

The Court of Claims reversed this provision. The contract says the causes excusing performance:

"include, but are *not* restricted to"

the categories named. The Court of Claims held this provision has the opposite effect. It ruled, astonishingly, that this provision operates (Appendix, p. 24):

"to restrict the clause"

to the categories enumerated.

The Court of Claims believed (see Opinion, Appendix, p. 25) that this rendering of the default clause was required by *Carnegie Steel Company v. United States* (1916), 240 U. S. 156. In so reading *Carnegie Steel* the Court of Claims as badly mangled that case as it had the contract. In *Carnegie Steel* (see p. 161) the contract, unlike the contract here in question, restricted relief to:

"unavoidable causes, *such as* [those enumerated]"

whereas the contract here in suit says the causes for relief:

"are *not* restricted to [those enumerated]."

III. COURT BELOW DISREGARDED FINDINGS NOT HELD TO BE CLEARLY ERRONEOUS.

The United States Armed Services Board of Contract Appeals found as follows (Finding 14, Appendix, p. 13):

> "On this evidence we find that * * * in the existing state of the art, it is impossible to manufacture a digital data recorder which employs a servo-mechanism, even if implemented by any known scheme, to repeat data of the type specifed from a remote source with the precision required by this contract."

The Board found further (Finding 21, Appendix, p. 19):

> "The impossibility of performance of this contract came about upon its execution. It existed because the provisions integrated went beyond the related state of the art."

The Government opened the argument in its brief before the Court of Claims by saying (p. 6):

> "It is true, as plaintiff states, that the Armed Services Board of Contract Appeals found that plaintiff's contract was impossible of performance."

These findings the Court of Claims disregarded without even purporting to find them unsupported by the evidence and without finding them clearly erroneous. With a brave "nothing is impossible" dictum, the Court of Claims said (Appendix, p. 24):

> "For example, in the not too distant past, while perhaps foreseeable, no organization would have thought possible, or undertaken a contract to construct a device whereby a living human body could be put in orbit around the earth; nevertheless it has been accomplished. Thus, in this case, we cannot categorically say that it was or is impossible to achieve the goal called for in plaintiff's contract."

The trier of the facts found performance was "impossible," and that this was so because the contract "went beyond" known art; it, therefore, was not for the Court of Claims to disregard these findings without adjudging them clearly erroneous. This the Court of Claims did not, and, in view of the record, could not do.

Findings surely are not to be so cavalierly disregarded. This Court should make it clear to the Court of Claims that it, equally with other courts in the Federal system, must accept the findings of the trier of the facts, until and unless

the findings are adjudged clearly erroneous. Such guidance is obviously needed. That the guidance be given is especially important for the Court of Claims has no one to monitor its practices save this Court.

There is not much point in having findings if they are not to be observed or are to be avoided by semantic trick or speculative fancy.

CONCLUSION.

The writ of certiorari prayed for should issue so that this Court may:

1. Inspect the trap the Court of Claims has fashioned out of the standard default clause utilized in Government contracts.
2. Undo the astonishing rule of *ejusdem generis* the Court of Claims has forged.
3. Compel the Court of Claims to abide by findings it refuses to call clearly erroneous.

Respectfully submitted,

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